No. 94-1837

(17)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,

v.

BILL NELSON, INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, FLORIDA DEPARTMENT OF INSURANCE, FLORIDA ASSOCIATION OF LIFE UNDERWRITERS, PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC., and FLORIDA ASSOCIATION OF INSURANCE AGENTS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether 12 U.S.C. § 92, which provides that national banks in places with no more than 5,000 inhabitants may act as insurance agents, preempts a Florida law that prohibits most such banks from engaging in most insurance agency activities.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in legal issues that affect

state and local governments. Insurance regulation is an area of historic state control and expertise. "When the States speak in the field of 'insurance' they speak with the authority of a long tradition." *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 68 (1959). Recognizing this tradition, Congress sought in the McCarran-Ferguson Act to ensure that States retain plenary authority over regulation of the "business of insurance." 15 U.S.C. § 1012.

Florida, like at least fourteen other States, *see* Pet. 6 n.1, has exercised its reserved regulatory power by restricting a type of insurance agency activity deemed by its legislature to be particularly susceptible to abuses—namely, insurance sales by agents controlled by bank holding companies. Such a regulatory choice plainly falls within the broad authority over the "business of insurance" reserved to States by the McCarran-Ferguson Act. *See generally* Ruth Gastel, *Financial Services*, Insurance Information Institute Reports (Aug. 1995) (discussing variations in state regulation of insurance sales by banks). Petitioner's reading of that Act, however, would permit such insurance regulation by the States to be overridden by a federal banking provision, 12 U.S.C. § 92, which permits national banks located in towns of less than 5,000 to sell insurance.

Such a result could have a significantly adverse impact on state insurance regulation. The Comptroller has taken the position, affirmed by two courts of appeals, that national banks may sell insurance from branch offices located in small towns to customers residing anywhere, without geographic limitation. *See NBD Bank, N.A. v. Bennett*, 67 F.3d 629 (7th Cir. 1995); *Independent Ins. Agents v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993); Comptroller Interp. Letter No. 366 [1985-87 Transfer Binder], Fed. Banking L. Rep. (CCH) Par. 85,536 (Aug. 18, 1986). Accordingly, if petitioner's claim is upheld, the insurance agency authority exercised by national banks under Section 92 would undermine the regulatory scheme for insurance agents in Florida and other States.

Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

SUMMARY OF ARGUMENT

1. The McCarran-Ferguson Act, 15 U.S.C. § 1012, was designed "broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946), *quoted in United States Dep't of Treas. v. Fabe*, 113 S.Ct. 2202, 2207 (1993). In passing the Act, Congress sought to restore and safeguard the States' historical primacy in the regulation of the business of insurance and to preserve their authority to protect policyholders from abuses. Towards that end, the Act "transformed the legal landscape by overturning the normal rules of pre-emption," *Fabe*, 113 S.Ct. at 2211, thereby preserving from preemption any law "enacted by any State for the purpose of regulating the business of insurance" unless it conflicts with a federal law that "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Accordingly, the analysis in any insurance preemption case "start[s] with a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements." *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 68 (1959).

2. Florida's law prohibiting most national banks from selling insurance was clearly enacted "for the purpose of regulating the business of insurance." The Court has emphasized that the policyholder relationship lies at the core of the "business of insurance," and that laws designed to protect policyholders in the sales and marketing of insur-

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

ance fall squarely within the scope of that term. *See, e.g., SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). In both purpose and effect, Florida's law protects policyholders by prohibiting sales under circumstances that, in the judgment of the legislature, carry an unacceptably high risk of coercion and abuse. *See Production Credit Ass'ns of Florida v. Department of Ins.*, 356 So.2d 31, 32 (Fla. Dist. Ct. App. 1978). It therefore plainly constitutes a law enacted "for the purpose of regulating the business of insurance" and is presumptively entitled to preservation under the McCarran-Ferguson Act's reverse preemption provision.

3. Section 92 does not "specifically relate to the business of insurance," and therefore does not preempt Florida's statute. As the Court has explained, a federal statute satisfies this exacting preemption standard only if it contains a "clear statement" of preemptive intent, *see Fabe*, 113 S.Ct. at 2211, or "expressly provide[s]" for such preemption. *Prudential*, 328 U.S. at 429. Section 92, a federal banking law passed at a time when the business of insurance was believed by Congress to be beyond the reach of its power, *see* Pet. App. 15a, contains no hint that it was intended to abrogate state insurance law. On the contrary, it is clear from the text, purpose, and history of both Section 92 and the McCarran-Ferguson Act that Section 92 does not have preemptive force.

As the structure and purpose of the McCarran-Ferguson Act make clear, the category of federal laws "specifically relat[ing] to the business of insurance" represents a narrow exception carved out of the broad authority preserved to the States to enact laws "for the purpose of regulating the business of insurance." Petitioner's assertion that a federal law permitting certain conduct automatically qualifies as one "specifically relat[ing] to the business of insurance," if a state law prohibiting the same conduct qualifies as one enacted "for the purpose of regulating the business of insurance," ignores this structure and purpose. Moreover, such a reading would render the

McCarran-Ferguson Act's unique reverse preemption provision superfluous, since that provision only comes into play when there is a federal law which permits, prohibits, or requires some conduct that the State has also sought to regulate as part of "the business of insurance." Because Section 92 does not "specifically relate" to the core concerns of the "business of insurance" it cannot satisfy the heavy burden it must meet to preempt Florida's statute.

ARGUMENT

THE McCARRAN-FERGUSON ACT PRESERVES FLORIDA'S LAW FROM PREEMPTION BY SECTION 92

A. The McCarran-Ferguson Act Establishes The Primacy Of State Regulation Of The Business Of Insurance

The McCarran-Ferguson Act was passed in reaction to this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which for the first time called into question the States' longstanding authority to regulate the business of insurance. In passing the Act, Congress sought to restore and safeguard the States' historical regulatory power over insurance, including the States' critical role in regulating both insurance companies and their agents in order to protect policyholders from abuses.[2] As Justice Jackson explained in dissent in *South-Eastern Underwriters*,

> For one hundred fifty years Congress never has undertaken to regulate the business of insurance. Therefore to give the public any protection against abuses to which that business is peculiarly susceptible the states have had to regulate it. Since 1851 the several states, spurred by necessity and with acquiescence of every branch of the Federal Government,

[2] *See generally* Peter R. Nehemkis, Jr., *Paul v. Virginia: The Need For Re-Examination*, 27 Geo. L.J. 519, 520-21 (1939) (discussing abuses accompanying growth of the insurance industry) (cited in *South-Eastern Underwriters*, 322 U.S. at 544 n.20).

> have been building up systems of regulation to discharge this duty toward their inhabitants.

322 U.S. at 584 (Jackson, J., dissenting).

The legislative history of the McCarran-Ferguson Act emphasizes this background: "From its beginning the business of insurance has been regarded as a local matter, to be subject to and regulated by the laws of the several States." S. Rep. No. 20, 79th Cong., 1st Sess. 1 (1945); *see also* H.R. Rep. No. 143, 79th Cong., 1st Sess. 1, 2 (1945) (same). Thus, as this Court stated in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), the McCarran-Ferguson Act "broadly . . . [gave] support to the existing and future state systems for regulating and taxing the business of insurance . . . by removing obstructions which might be thought to flow from [Congress'] power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation." *Id.* at 429-30.[3]

In *United States Dep't of Treas. v. Fabe*, 113 S.Ct. 2202 (1993), the Court reaffirmed the sweeping effect of the McCarran-Ferguson Act. As the Court explained, the Act not only restored state authority to regulate insurance after *South-Eastern Underwriters*, it also

> transformed the legal landscape by overturning the normal rules of pre-emption. Ordinarily, a federal law supersedes any inconsistent state law. The first clause of § 2(b) reverses this by imposing what is,

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[3] *See also United States Dep't of Treas. v. Fabe*, 113 S.Ct. 2202, 2210 (1993) ("As was stated in [*Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979)], the first clause of § 2(b) was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance."); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1099 n.5 (1983) (Powell, J., dissenting in part and concurring in part) ("Congress thus enacted broad legislation 'so that the several States may know that the Congress desires to protect the continued regulation . . . of the business of insurance by the several States.'") (quoting H.R. Rep. No. 143)).

> in effect, a clear-statement rule, a rule that state laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.

Id. at 2211 (citing 15 U.S.C. § 1012(b)).

Because of the unique "reverse preemption" operation of the McCarran-Ferguson Act, which Congress deemed necessary to preserve the States' long-established regulatory powers over insurance, state regulation of the business of insurance is presumptively valid as against assertedly conflicting federal laws. Hence, the Court, in insurance preemption cases,

> start[s] with a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements. When the States speak in the field of "insurance" they speak with the authority of a long tradition.

SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 68 (1959).

Accordingly, any law "enacted by any State for the purpose of regulating the business of insurance" is preserved from preemption *unless* it conflicts with a federal law that "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Florida's law clearly satisfies both parts of this statutory formula and is thereby preserved from preemption. It is a law enacted for the purpose of regulating the business of insurance, and the assertedly conflicting federal law, 12 U.S.C. § 92, does not specifically relate to the business of insurance.[4] Petitioner's

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[4] *Amici* agree with respondents that, even in the absence of McCarran-Ferguson's "reverse preemption" provisions, Section 92's merely permissive provisions do not directly conflict with Florida's prohibition on bank insurance sales so as to require preemption. *See* Resp. Bill Nelson Br. Issue III; Resp. Ins. Agents Br. Pt. I; *cf. Exxon Corp. v. Maryland*, 437 U.S. 117, 131 (1978) (declining to

argument to the contrary is flatly inconsistent with the structure and purpose of the McCarran-Ferguson Act.

B. Florida's Law Was Enacted "For The Purpose Of Regulating The Business Of Insurance"

Fabe contains this Court's most recent interpretation of the phrase "for the purpose of regulating the business of insurance." In that case, the Court explained that:

> The broad category of laws enacted "for the purpose of regulating the business of insurance" consists of laws that possess the "end, intention, or aim" of adjusting, managing, or controlling the business of insurance. This category necessarily encompasses more than just the "business of insurance."

113 S.Ct. at 2210 (citation omitted). In order to assess whether Florida's law falls within that "broad category of laws," it is first necessary to consider the meaning of the narrower term "business of insurance."

In *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), the Court defined the term "business of insurance" by identifying the core regulatory areas that Congress sought to reserve to the States through its use of that term:

> The selling and advertising of policies and the licensing of companies and their agents are also within the scope of [McCarran-Ferguson]. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which Paul v. Virginia held was not "commerce."

find preemption warranted where "the alleged 'conflict' [between a Maryland law and the Robinson-Patman Act] is in the possibility that the Maryland statute may require uniformity in some situations in which the Robinson-Patman Act would *permit* localized discrimination"). For purposes of argument, however, *amici* here assume that Section 92, which permits national banks located in towns of less than 5,000 to sell insurance, conflicts with Florida's law prohibiting most insurance sales by most such banks.

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." . . . [W]hatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, *directly or indirectly* are laws regulating the "business of insurance."

Id. at 460 (citations omitted) (emphasis added).

This key language, recently reiterated by the Court in *Fabe*, 113 S.Ct. at 2208, plainly establishes that the Florida law is one enacted "for the purpose of regulating the business of insurance." In both purpose and effect, Florida's law protects insurance policyholders by restricting the conditions under which contracts of insurance may be sold. It thereby regulates the relationship between policyholders and insurance companies. *See Production Credit Ass'ns v. Department of Ins.*, 356 So.2d 31, 32 (Fla. Dist. Ct. App. 1978) ("The Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest.").[5]

[5] *See also Glendale Fed. S & L Ass'n v. Florida Dep't of Ins.*, 587 So.2d 534, 536-37 & n.1 (Fla. Dist. Ct. App. 1991) (*per curiam*), *rev. denied*, 599 So.2d 656 (Fla. 1992); Pet. App. 11a-12a (opinion of the court of appeals).

The United States urges the Court to undertake an independent analysis of the "actual purpose" of Florida's law. *See* Br. *Am. Cur.* United States at 16. Such an inquiry has not been deemed necessary or appropriate by the Court unless the purpose articulated by the legislature and affirmed by state courts " 'could not have been a goal of the legislation.' " *See, e.g., Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 463 n. 7 (1981) (citation omitted); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469-70 (1981) (plurality opinion). Indeed, the Court "has long recognized that '[i]nquiries into congressional motives or purposes

Moreover, Florida's concern with protecting policyholders from abuses by insurance agents clearly falls within "the business of insurance" as defined by this Court's opinions interpreting that language within the narrower confines of the McCarran-Ferguson Act's antitrust exemption.[6] *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205 (1979), and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), establish "three criteria relevant in determining whether a particular practice is part of the 'business of insurance' ":

> [*F*]*irst*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Pireno, 458 U.S. at 129.

Florida's law clearly satisfies these criteria. With respect to the first element, "[t]he transfer of risk from insured to insurer is effected by means of the contract between the parties—the insurance policy—and that transfer is complete at the time that the contract is entered." *Pireno*, 458 U.S. at 130; *see also* George J. Couch, 9 *Cyclopedia of Insurance Law*, § 39:53, at 535 (1985) ("the risk commences upon completion of the contract in the absence of another provision"). Protecting policyholders by regulating when and how insurance contracts may be entered into constitutes regulation of the business of insurance at its most elemental level. Relatedly, the Florida law seeks to safeguard and enhance the policyholder relationship by prohibiting insurance sales by agents—holding company-owned banks—which the legislature determined would present a heightened potential for unfair or coercive practices.

Contrary to the suggestion of the United States (Br. at 11), the exceptions which Florida's law provides for independent banks and for bank holding companies exempt under § 4(d) of the Bank Holding Company Act, 12 U.S.C. § 1843(d), are fully consistent with the goal of protecting policyholders from overreaching.[7] These exceptions show that Florida was concerned with regulating those banks that, in the legislature's view, were most likely to have sufficient economic power to engage in abuses such as tying. Federal law reflects a similar concern with the concentrated economic power of most bank holding companies, and likewise recognizes exceptions for entities of limited economic influence. *See* 12 U.S.C. § 1843(d)(3) (providing certain exemptions for bank holding companies with insufficient economic power to engage in anticompetitive practices such as tying); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 46 (1980) (Bank Holding Company Act was intended "to prevent anticompetitive tendencies" resulting from common ownership of banking and nonbanking enterprises); Pauline

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are a hazardous matter,' and the search for the 'actual' or 'primary' purpose of a statute is likely to be elusive." *Id.* (citations omitted). Nor does the word "purpose" in the McCarran-Ferguson Act require such an inquiry. The *Fabe* Court viewed the word "purpose" in the first part of § 2(b) as an expansive term that broadened the category of "business of insurance." 113 S.Ct. at 2210 & n. 6. Consistent with that view, the Court indicated that a state law would qualify as one "enacted for the purpose of regulating the business of insurance" if such regulation was its "end, intention, or aim." *Id.* at 2210 (citation omitted).

[6] *Fabe* makes it clear that a statute need not satisfy the more restrictive language found in the antitrust exemption in order to qualify as one "enacted for the purpose of regulating the business of insurance." 113 S.Ct. at 2209. Florida's law, however, falls well within the scope of the "business of insurance" as defined in the antitrust context.

[7] The United States' criticism of the exceptions found in Florida's law amounts to an equal protection argument, an issue not before the Court. In any event, as the Florida courts have held, the classifications drawn in Florida's law are clearly rational ones. *See Glendale Federal S&L v. Dep't of Insurance*, 587 So.2d at 537; *cf. Exxon v. Maryland*, 437 U.S. at 124-28.

B. Heller, *Federal Bank Holding Company Law* § 1.06[1] (1995 ed.) (noting that federal law places more stringent requirements on bank holding companies than on independent banks).

Finally, it is clear that Florida's regulation places limits only on the activities of entities within the insurance industry. Florida's statute regulates holding company-owned banks only insofar as they seek to become marketers of insurance. Regulation of insurance does not fall outside the scope of the "business of insurance" merely because such regulation affects entities that have business interests in addition to insurance.

"[W]hatever else was said in *Royal Drug* about the indispensable characteristic of risk-spreading, the Court found the contractual relationship between the insurer and the insured to be the essence of the 'business of insurance.'" *Pireno,* 458 U.S. at 136 (Rehnquist, J., dissenting). The Florida law was clearly enacted for the purpose of regulating this core component of the business of insurance. It limits the conditions under which insurers may use agents to form contracts with insureds, in order to reduce the risk of unfairness in the policyholder relationship.

Indeed, policyholder protection, the goal of the Florida law, is one of the principal purposes for which the "business of insurance" has historically been regulated. State insurance licensing requirements, a fundamental aspect of insurance regulation, are primarily designed to protect consumers.[8] In *Robertson v. California,* 328 U.S. 440 (1946), the Court upheld against a Commerce Clause challenge a California requirement that insurance agents meet certain conditions to obtain a license, noting the need for such requirements in order to protect the public:

[8] Almost all States have detailed insurance regulations that prohibit overreaching and misrepresentations in insurance sales and provide for license revocation in the event of violations. *See* John A. Appleman and Jean Appleman, 19 *Insurance Law and Practice* § 10557 (1982).

> We accept the regulation for what [it] purports to be on its face and by the statute's express declaration, namely, a series of regulations designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of insurance by personal solicitation and salesmanship. That such dangers may exist, may even be widely prevalent in the absence of such controls, is a matter of common knowledge and experience.

Id. at 447.[9]

Statutes like Florida's, which limit the types of business entities that may sell certain types of insurance, are essential components of insurance licensing regulation designed to protect consumers. As the Court explained in *Robertson,*

> It would be idle to require licensing of insurance agents, in order to secure honesty and competence, yet to place no restraint upon the kind of insurance to be sold or the kinds of companies allowed to sell it, and then to cover their representatives with their immunity.

Id. at 457.

The specific problem Florida sought to target in its insurance regulation—the potential for coercive "tying" practices—has been recognized as among the most difficult to regulate:

[9] *See also* Robert E. Keeton and Alan I. Widiss, *Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* § 8.2(a), at 938-39 (1988) (stating that a major objective of insurance regulation is "to avoid overreaching by insurers"; such regulation "is principally directed at marketing practices and arrangements, [and] has been imposed by both statutes and judicially created doctrines") (footnotes omitted); Ronald T. Anderson, *Agents' Legal Responsibility* 21 (1980) ("Obviously, most insurance producer licensing is for purposes of protecting the public.").

> One of the troublesome areas in the regulation of both insurance marketing generally and sales representatives in particular concerns tie-in transactions. For example, a legal entity engaged in consumer financing may seek either to function as an agent for the sale of credit life insurance or to participate in an arrangement in which persons associated with it do so as individuals. . . . The tie-in arrangements, which are frequently commercially advantageous, have been involved in substantial abuses. Efforts to regulate such tie-in arrangements have sometimes succeeded and sometimes failed.

Keeton & Widiss, *Insurance Law*, § 8.2(b), at 941 (footnotes omitted).[10] The Florida law, which is based on the legislative judgment that insurance sales by holding company-owned banks present an unacceptable risk of such overreaching, is clearly one enacted for the purpose of regulating the business of insurance. Florida's statute regulates the relationship between insurance companies and policyholders by restricting the circumstances under which that relationship may be created (*see Nat'l Securities*, 393 U.S. at 460), and plainly affects practices that are an "integral part of the policy relationship between the insurer and the insured." *Pireno*, 458 U.S. at 129.

[10] *See generally* U.S. General Accounting Office, *Bank Powers: Issues Relating to Banks Selling Insurance* (1990) (GAO/GGD-90-113) (noting potential for tying or perceived tying in context of bank sales of insurance); *see also* Spencer L. Kimball and Bartlett A. Jackson, *The Regulation of Insurance Marketing*, 61 Colum. L. Rev. 141, 156 (1961) (tying "difficult to prevent because of the difficulty of proof when the coercion is subtle").

The GAO report pointed out certain subtler risks as well, including consumer perceptions of tying pressures even if such pressures were not overtly intended by the financial institution, *Bank Powers* at 19, or coercion stemming from a bank's refusal to accept insurance binders from other insurers. *Id.* at 22. Moreover, the GAO found the risk of tying likely to be greater in small towns having a limited number of insurance agents. *Id.*

Petitioner attempts to draw Florida's law out of the compass of McCarran-Ferguson by arguing that it cannot qualify as "regulation." Toward that end, petitioner characterizes the law as an "isolated, sporadic and pinpointed foray[]" and as "random prohibitory legislation." Pet. Br. 23. These arguments are without merit.

While it is true that "Congress' purpose [in McCarran-Ferguson] was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance," *Prudential*, 328 U.S. at 429, there is no support for petitioner's contention (Br. at 22-23) that Congress meant thereby to protect only *entire* regulatory systems adopted in a single sweep. This Court has always recognized that States may legislate policy in an incremental fashion, *see, e.g., Clover Leaf Creamery*, 449 U.S. at 466; *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955), and nothing in the broad language of the McCarran-Ferguson Act suggests that Congress wished to bar the States from regulating the business of insurance in this manner. On the contrary, McCarran-Ferguson was designed to restore to States the plenary authority and discretion they had always enjoyed when regulating the business of insurance. *See Prudential*, 328 U.S. at 430 (Congress "declar[ed] expressly and affirmatively that continued state regulation and taxation of this business is in the public interest"), *quoted in Fabe*, 113 S. Ct. at 2207. *See also Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 319 (1955) (purpose of McCarran-Ferguson is "to assure that existing state power to regulate insurance would continue").

Also without merit is petitioner's suggestion that Florida's law does not constitute "regulation" because it operates by prohibiting certain conduct. Every regulation constitutes a "prohibition" from engaging in certain conduct, if the conditions set forth in the regulatory scheme

are not met.[11] Indeed, the Court expressly rejected a proffered distinction between prohibition and regulation in *FTC v. National Casualty Co.*, 357 U.S. 560 (1958) (*per curiam*):

> [Petitioner] urges that a general prohibition designed to guarantee certain standards of conduct is too "inchoate" to be "regulation" until that prohibition has been crystallized into "administrative elaboration of these standards and application in individual cases." However, assuming there is some difference in the McCarran-Ferguson Act between "legislation" and "regulation," nothing in the language of that Act or its legislative history supports the distinctions drawn by petitioner.

Id. at 564-65. *Cf. Robertson v. California,* 328 U.S. at 452-53 & n.15 (rejecting argument that insurance licensing requirements constituted prohibition of interstate commerce rather than insurance regulation).

Nor is there any substance to petitioner's asserted distinction between regulations targeted at "policyholders" and those, like Florida's, that can be viewed as protecting "potential policyholders." Any regulation of insurance marketing and sales practices, like the Florida statute, protects potential policyholders, and such regulation is indisputably part of the "business of insurance." *See, e.g., National Securities,* 393 U.S. at 460 ("[t]he selling and advertising of policies" falls within the scope of the "business of insurance"). By prohibiting agency practices that the Florida legislature deemed likely to result in abuses of *potential* policyholders, the Florida statute also protects *actual* policyholders from the heightened risk of policies that do not serve their interests.[12]

[11] For example, state insurance regulations dictating "the type of policy which could be issued," *National Securities*, 393 U.S. at 460, have the effect of "prohibiting" transactions involving the disallowed types of policies. Similarly, licensing requirements for insurance agents obviously constitute "regulation," even though they can at times amount to a "prohibition" barring particular individuals from engaging in sales.

Relatedly, petitioner argues that the Florida law protects only bank customers and not insurance purchasers. The fact that the Florida law regulates insurance sales by eliminating holding company-owned banks as insurance agents does not transform the statute, which is specifically designed to protect policyholders, into a generalized protection of bank customers. By petitioner's reasoning, a state law regulating the direct mail solicitation of insurance would not qualify as insurance regulation either, as it could instead be characterized as protection of U.S. postal customers or the public at large.

In sum, Florida's law, which has the purpose and effect of protecting policyholders from overreaching by agents that are bank holding company-owned banks, falls squarely within that broad category of laws enacted "for the purpose of regulating the business of insurance." Accordingly, the Florida statute plainly satisfies the first prong of the two-part test for invoking the anti-preemption rule of the McCarran-Ferguson Act.

C. Section 92 Does Not "Specifically Relate To The Business Of Insurance"

Because Florida's law was enacted for the purpose of regulating the business of insurance, it cannot be pre-

[12] Most individuals are "policyholders" (either as owner or beneficiary):

> Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.

South-Eastern Underwriters, 322 U.S. at 540 (footnote omitted). The question, then, is usually not *whether* a policyholder relationship will be formed, but only where, when, and under what circumstances.

empted by a conflicting federal law unless that law "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Under this Court's decisions, a federal statute does not satisfy this exacting preemption standard unless it contains a "clear statement" of preemptive intent, *see Fabe*, 113 S.Ct. at 2211, or "expressly provide[s]" for such preemption. *Prudential*, 328 U.S. at 429. Section 92 does not contain any language stating that it is intended to preempt conflicting state laws. While this lack of express preemptive language alone should be determinative, it is clear from the text, history, and structure of both Section 92 and the McCarran-Ferguson Act that Section 92 does not have preemptive force.

The structure of the McCarran-Ferguson Act reflects Congress' intent that States have broad authority to regulate the business of insurance in such key areas as policyholder protection, subject only to intentional, conscious abrogation by Congress. The category of federal laws "specifically relat[ing] to the business of insurance" thus represents a narrow exception carved out of the broad authority granted States to enact laws "for the purpose of regulating the business of insurance."

Further, both the legislative history and the text of the McCarran-Ferguson Act reflect a Congressional concern that state insurance law not be displaced through mere inadvertence or through laws directed at other matters. *See* 91 Cong. Rec. 485 (1945) (statement of Senator Revercomb) ("We want the business [of insurance] left in the control of the States, unless by enactment in the future we specifically state that we do not want something they are doing to be continued.").[13]

Petitioner does not attempt to demonstrate how Section 92 "specifically relates to the business of insurance." Instead, petitioner simply asserts that Section 92 must

[13] *See also Fabe*, 113 S.Ct. at 2211 n.7 (quoting 91 Cong. Rec. 1487 (1945) (statements of Senators Ferguson and Mahoney)).

"specifically relate to the business of insurance" if Florida's law is found to be a law enacted "for the purpose of regulating the business of insurance." Petitioner's assertion is flawed because it fails to take account of the different formulations of the two statutory tests, which together reflect the purpose of the McCarran-Ferguson Act.

Petitioner places great emphasis on the fact that Florida's law prohibits bank sales of insurance while Section 92 permits such sales. *See, e.g.*, Pet. Br. 41, 47; *see also* Br. *Am. Cur.* U.S. 23. But that fact, while true, proves nothing. Section 2(b) of the McCarran-Ferguson Act only comes into play when there is an "Act of Congress" which could potentially "be construed to invalidate, impair, or supersede" a state law enacted for the purpose of regulating the business of insurance. In every such instance, it will necessarily be the case that the federal law will permit, prohibit, or require some specific conduct that the State has also sought to regulate as part of "the business of insurance."[14] If that were sufficient, as a matter of law, to qualify the federal law as one "specifically relat[ing] to the business of insurance," Section 2(b) of the McCarran-Ferguson Act would be meaningless.

Under petitioner's interpretation, the second clause of Section 2(b), allowing preemption where a conflicting federal law "specifically relates to the business of insurance," would, as a practical matter, nullify the first clause, and would allow the States the power to enact laws "for the purpose of regulating the business of insurance" only where federal law was not in conflict. Under that approach, the whole objective of Congress to preserve state insurance regulation by establishing a special presumption

[14] For example, the effect of the federal statute at issue in *Fabe* was to prohibit giving insurance policyholders priority over federal claimants in bankruptcy. Yet despite this direct conflict with a state law regulating the business of insurance, it was agreed by the parties that the federal law was not one that "specifically relates to the business of insurance." *See* 113 S.Ct. at 2208.

against preemption would be defeated. Petitioner's construction must therefore be rejected, because it "offends the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect," and that an interpretation should be rejected if it would render one provision "superfluous" or "nugatory." *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 633-34 & n.26 (1973). In contrast, the Court's requirement of a clear statement to overcome the presumption against preemption of state insurance regulation gives Section 2(b) a meaning that is fully consistent with the purpose of the McCarran-Ferguson Act.

In fact, it should not be at all surprising that a state law prohibiting certain conduct in order to protect policyholders could be one enacted "for the purpose of regulating the business of insurance," while a federal law merely allowing the same conduct (and thereby having no definitive effect upon the policyholder relationship) would not qualify as one "specifically relat[ing] to the business of insurance." Unlike Florida's law, Section 92 does not set the terms under which insurance sales to consumers will take place and, therefore, does not safeguard or otherwise affect the policyholder relationship. Section 92 does not purport to affect any of the elements that this Court has found to be at the "core" of the "business of insurance": the terms of the insurance contract, the spreading and underwriting of risk, and, perhaps most importantly, the policyholder relationship. *See, e.g., Royal Drug,* 440 U.S. at 211-16; *Pireno,* 458 U.S. at 127-30; *Fabe,* 113 S.Ct. at 2208-09; *National Securities,* 393 U.S. at 460. Instead, Section 92 simply permits a national bank located in a small town to enter into an agency contract with an insurance company that is authorized under state law to do business in that locality.

In arguing that Section 92 must "specifically relate to the business of insurance," petitioner also relies heavily on the broad meaning given the words "relate to" in other

statutes, such as ERISA and the Airline Deregulation Act of 1978. *See* Pet. Br. 43 & n.4. This reliance is misplaced. Not only do the other statutes referenced by petitioner fail to contain the important qualifier "specifically," they are also vastly different from the McCarran-Ferguson Act in their structure, objectives, and broad preemptive effect, making them inapt as analogies here. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1982) (referencing ERISA's "virtually unique pre-emption provision"), *quoted in Morales v. Trans World Airlines*, 112 S.Ct. 2031, 2054 (1992) (Stevens, J., dissenting).

The Court has repeatedly warned against undue reliance on a single word or phrase in interpreting a statute; instead, the statute as a whole must be considered. "On numerous occasions we have noted that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (citations and internal quotation marks omitted); *see U.S. National Bank v. Independent Ins. Agents*, 113 S.Ct. 2173, 2182 (1993) (invoking same rule in interpreting Section 92); *see also Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992) (opinion of O'Connor, J.) ("Our ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole."). This is particularly important where the words upon which a party relies are as inherently indeterminate as the ones petitioner relies on here. As the Court recently noted in an ERISA case:

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere." . . . We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute

as a guide to the scope of the state law that Congress understood would survive.

N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S.Ct. 1671, 1677 (1995) (citation omitted). And an analysis of the structure and purpose of both Section 92 and the McCarran-Ferguson Act makes clear that Florida's law is not preempted.

Section 92, which is part of the Federal Reserve Act, was enacted in 1916, "at a time when the business of insurance was believed to be beyond the reach of Congress' power." *Fabe*, 113 S.Ct. at 2212; *see* Pet. App. 15a. Section 92 contains absolutely no indication that Congress consciously intended to displace state authority over the business of insurance where national banks are concerned. On the contrary, it specifically refers to the States' authority over the issuance and sale of insurance policies. *See* 12 U.S.C. § 92 (banks may "act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State").

Section 92 does one thing only: it allows national banks to act as agents for insurance companies and thereby permits such banks to engage in an additional line of business which could enable them to become more profitable. As petitioner explains,

> The statute [Section 92], its history, and its construction by Comptrollers since 1916 thus leave no doubt that the purpose and effect of the statute are, as the Seventh Circuit recently put it, to "identif[y] a line of business in which national banks may engage."

Pet. Br. 14-15 (quoting *NBD Bank, N.A. v. Bennett*, 67 F.3d 629 (7th Cir. 1995)).

Providing for this possibility for enhancement of national bank revenues was not only the sole purpose of Section 92, as shown by its legislative history, *see* Br.

Am. Cur. U.S. at 20-21, but also its only practical function and effect. Section 92 has nothing to say (either in its text or in its operation) about the regulation of insurance companies or the protection of policyholders. Section 92 refers only to the relationship between insurance companies and the national banks acting as their agents. Indeed, Section 92 makes clear that "the authorities of the State" in which each national bank is located will determine whether any particular insurance company is "authorized" to offer insurance in that State. Because Section 92 neither establishes any standards nor provides any protections that would affect insurance companies, the policyholder relationship, the insurance contract, or the spreading or transfer of risk, Section 92 does not "specifically relate" to the "business of insurance" as defined by this Court's decisions. *See National Securities*, 393 U.S. at 460; *Pireno*, 458 U.S. at 129.

That Section 92 has no preemptive effect where state laws regulating the business of insurance are concerned is further demonstrated by the fact that national banks selling insurance are viewed by the United States as properly subject to all other forms of state insurance regulation, short of prohibition.[15] If petitioner were correct in

[15] *See* Br. *Am. Cur.* U.S. 12 ("The government has never argued that Section 92 would preempt the application of such reasonable and generally applicable [sales and licensing] regulations, so long as they are neither designed nor applied differentially to exclude national banks from undertaking insurance activities authorized by federal law."). *See also id.* at 13 ("McCarran-Ferguson's protection would . . . presumably extend to reasonable categorical exclusions relevant to the protection of present or potential policyholders.").

As stated in note 18, *infra*, the OCC has not adopted any formal regulations governing the methods used by national banks in selling insurance under § 92. In contrast, the OCC *has* adopted regulations which restrict the terms under which national banks may sell credit life, health, and accident insurance, which (unlike regular life insurance) are forms of insurance that national banks may sell pursuant to their general banking powers under 12 U.S.C. § 24 (Seventh). *See* 12 C.F.R. Part 2.

asserting that Section 92 grants national banks in small communities a comprehensive right to sell insurance free of state interference as a means of supplementing their income, and in further asserting that Section 92 preempts any state insurance regulation that constitutes "'an obstacle to the accomplishment and execution of the full purposes and objectives' of [federal law]," *see* Pet. Br. 16-17 (citations omitted), then *no* state insurance regulation of sales of insurance by national banks could stand.[16] For example, insurance rate regulation, presumed to be applicable to sales made by national banks, *see* GAO, *Bank Powers* at 13, could limit those banks' competitive advantage. *Id.* at 16.[17]

[16] It is significant that the OCC, in areas unrelated to insurance, has consistently taken the position that it has exclusive authority to regulate national banks, with the result that all state licensing, recordkeeping, and registration requirements are preempted. *See, e.g.*, Comptroller Interp. Letter No. 614 [1992-93 Transfer Binder] Fed. Banking L. Rep. (CCH) Par. 83,454 (Jan. 15, 1993) at 71,579:

> As instrumentalities of the federal government, national banks' powers are granted by Congress. One of the powers expressly granted to national banks by federal law is that of lending money on personal security. 12 U.S.C. § 24 (Seventh). The exercise of this power cannot be subject to the approval of state officials, and states have no power to require national banks to obtain a license to engage in an activity that is permitted to them by federal law. The OCC consistently has taken the position that state laws that attempt to license the lawful activities of national banks, whether domiciled in that state or not, are preempted.

(citations omitted). *See also* Comptroller Interp. Letter No. 616 [1992-93 Transfer Binder] Fed. Banking L. Rep. (CCH) Par. 83,456 (Feb. 26, 1993) at 71,583 (state requirement that bank provide information is preempted; collecting past interpretive letters preempting similar state disclosure laws).

[17] Likewise, anti-tying regulations, which the United States considers a legitimate exercise of state authority, *see* Br. *Am. Cur.* U.S. 14, could limit the ability of national banks to derive income from insurance sales by eroding their cost advantages. *See* GAO, *Bank Powers* at 25 ("Some of these measures [to reduce the risk of coercive tie-ins] . . . may reduce or eliminate the cost savings that might otherwise flow from the joint marketing of banking and insurance services.").

Thus, the logical implication of finding Section 92 to have preemptive force in the present case would be directly to undermine the McCarran-Ferguson Act by prohibiting the States from imposing any significant limitation on insurance sales by national banks pursuant to Section 92. Given the Comptroller's view that national banks may sell insurance without geographical limit, as long as such sales are made through a small town office, *see supra* p. 2, the result would be a significant erosion of state authority over insurance sales—a result flatly inconsistent with the objectives of the McCarran-Ferguson Act.[18]

In sum, Section 92 does not satisfy the heavy burden it must meet to preempt Florida's statute because Section

[18] Such a federally-created zone in which insurance vendors could operate free of state control would undermine the consumer protection interests the McCarran-Ferguson Act seeks to safeguard. Proposals which would have removed insurance sales from state regulatory oversight have been repeatedly and soundly rejected by Congress—with good reason. *See South-Eastern Underwriters*, 322 U.S. at 592 n.15 (Jackson, J. dissenting).

As Louis Brandeis, speaking as counsel for the Protective Committee of Policyholders in the Equitable Life Assurance Society (Oct. 26, 1905), explained in opposing a bill to federalize insurance regulation:

> It [the Dryden bill] seeks to rob the State even of the right to protect its own citizens from the legalized robbery to which present insurance measures subject the citizens, for by the terms of the bill a Federal license would secure the right to do business within the borders of the State, regardless of the State prohibitions, free from the State's protective regulations.

South-Eastern Underwriters, 322 U.S. at 593 n.17 (Jackson, J., dissenting) (quoting Brandeis statement).

It is noteworthy that the OCC's sole formal regulation under Section 92—12 C.F.R. § 7.7100—simply reiterates the authority of national banks to sell insurance from bank offices located in towns of less than 5,000. The regulation does not contain any provisions regulating insurance sales practices or otherwise protecting consumers.

92 does not "specifically relate" to the business of insurance within the contemplation of Section 2(b) of the McCarran-Ferguson Act. Accordingly, the second prerequisite for applying the anti-preemption rule of Section 2(b) has clearly been met in this case. Petitioner's attempt to subordinate state regulation of insurance sales by national banks to the terms of Section 92 is fundamentally at odds with both the terms and purpose of the McCarran-Ferguson Act. That Act was expressly designed to preserve to the States the very type of regulatory authority exercised by Florida here—regulation directed at protecting policyholders from improper practices in the sale of insurance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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